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Opinion on transfer from the Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES PRICE RUMLEY, JR.,

Defendant and Appellant.

F071636, F071666

(Super. Ct. Nos. CF04909092 & F13905022)

OPINION

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Sandra Gillies, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and Peña, J.

In 2015, defendant James Price Rumley, Jr., appealed, contending the trial court erred by reimposing a one-year prior prison term enhancement after the conviction underlying the prison term had been reduced to a misdemeanor under Proposition 47. We disagreed and affirmed. The Supreme Court granted review and has now transferred the case back to us to vacate our decision and reconsider the case in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), filed on July 30, 2018. We strike the enhancement and remand for resentencing.

BACKGROUND

On October 18, 2013, in case No. F13905022, defendant pled no contest to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1) and identity theft (Pen. Code, § 530.5, subd. (c)(3);[1] count 2). He admitted two prior prison term allegations (§ 667.5, subd. (b))—one based on a 2005 conviction under Health and Safety Code section 11377, subdivision (a) in case No. F04909092-9, and the other based on a 2011 conviction under Vehicle Code section 10851, subdivision (a). The trial court sentenced him to five years eight months as follows: three years on count 1, eight consecutive months on count 2, plus 2 one-year terms for the prior prison term enhancements. The court then suspended execution of the sentence and granted defendant five years' probation.

On August 22, 2014, after defendant violated probation, the trial court imposed the previously suspended five-year-eight-month term.

On November 4, 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).)

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[1] All statutory references are to the Penal Code unless otherwise noted.

On February 23, 2015, defendant filed Proposition 47 petitions on various convictions, including both the conviction in count 1 and the 2005 conviction underlying a prior prison term allegation in this case.

On March 30, 2015, the trial court granted the Proposition 47 petitions as to both convictions, reducing them both to misdemeanors. The court then resentenced defendant to two years on count 2, plus two years for the prior prison term enhancements.

On May 29, 2015, defendant filed a notice of appeal.

On June 24, 2016, we affirmed the judgment in *People v. Rumley* (June 24, 2016, F071636, F071666) [nonpub. opn.].

On October 10, 2018, the Supreme Court transferred the opinion back to this court.

DISCUSSION

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Rivera*, *supra*, 233 Cal.App.4th. at p. 1091.) Among the enumerated offenses set forth in Proposition 47 is a violation of Health and Safety Code section 11377, subdivision (a).

Proposition 47 also created a new resentencing provision, section 1170.18, which provides procedural mechanisms for (1) resentencing for inmates currently serving sentences for felonies that are now misdemeanors under Proposition 47 (§ 1170.18, subds. (a), (b)); and (2) designation of such felonies as misdemeanors for persons who have already completed their sentences (§ 1170.18, subds. (f), (g)). (See *Rivera*, *supra*, 233 Cal.App.4th at pp. 1092-1093.) Once a felony is reduced to a misdemeanor under Proposition 47, it "shall be considered a misdemeanor for all purposes …." (§ 1170.18, subd. (k).)

In *Buycks*, the Supreme Court resolved an issue on which the appellate courts had disagreed—whether a felony reduced to a misdemeanor under Proposition 47 can still function as the basis for a prior prison term enhancement. *Buycks* generally answered, no, it cannot. (*Buycks*, *supra*, 5 Cal.5th at p. 890 ["section 1170.18, subdivision (k) can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under [Proposition 47]"].)

Buycks noted, however, that the mechanism for addressing these unsupported enhancements is not specified by Proposition 47: "Proposition 47 does not provide a specific mechanism for recalling and resentencing a judgment solely because a felony-based enhancement has been collaterally affected by the reduction of a conviction to a misdemeanor in a separate judgment." (*Buycks*, *supra*, 5 Cal.5th at p. 892.) *Buycks* explained that "under some circumstances such challenges may be brought in a resentencing procedure under section 1170.18; they may also be brought on petition for writ of habeas corpus, in reliance on the retroactivity principle of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In the latter instance, relief is limited to judgments that were not final at the time the initiative took effect on November 5, 2014." (*Id.* at pp. 871-872.)

First, *Buycks* explained that when a trial court grants a Proposition 47 petition on a current Proposition 47-eligible felony conviction under section 1170.18, subdivision (a), and thus is required to fully resentence the defendant, the court should at that time also reevaluate whether any enhancements in that judgment are no longer applicable because the felony convictions underlying them have also been reduced to misdemeanors under Proposition 47. If so, the court may not reimpose those enhancements "because at that point [a] reduced conviction 'shall be considered a misdemeanor for all purposes.' (§ 1170.18, subd. (k).) Under these limited circumstances, a defendant may … challenge any prison prior enhancement in that judgment if the underlying felony has been reduced

to a misdemeanor under Proposition 47, notwithstanding the finality of that judgment." (*Buycks*, *supra*, 5 Cal.5th at pp. 894-895; see *id*. at p. 896.)

Second, *Buycks* explained that even when a defendant petitions only to reduce a Proposition 47-eligible conviction underlying an enhancement, courts are authorized to strike those enhancements: "[A]s to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, … Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor under [Proposition 47]." (*Buycks*, *supra*, 5 Cal.5th at p. 888.) But *Buycks* noted that in these cases, where there is no resentencing of a current Proposition 47-eligible felony conviction, another mechanism for challenging the enhancement is required. The court resolved this dilemma by concluding that the defendant may seek relief via a petition for writ of habeas corpus under section 1170.18, subdivision (k). (*Buycks*, *supra*, at p. 895.) "[T]he collateral consequences of Proposition 47's mandate to have the redesignated offense 'be considered a misdemeanor for all purposes' can properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect. [¶] [T]he 'misdemeanor for all purposes' language of section 1170.18, subdivision (k), is an ameliorative provision distinct from the ameliorative provisions of subdivisions (a) and (f) of the same statute which provide express mechanisms for reducing felony convictions to misdemeanors." (*Ibid*.) Noting that habeas petitions have been used to afford relief where a collateral attack on enhancements is concerned, *Buycks* concluded a habeas petition is the appropriate vehicle for a defendant to seek relief under such circumstances. (*Id*. at pp. 895-896.)

In this case, the first option applies. After the trial court reduced some of defendant's felony convictions to misdemeanors pursuant to Proposition 47, including count 1, the court resentenced defendant. As we have explained, the court's obligation to

reconsider the entire aggregate sentence upon resentencing included the obligation to reevaluate the collateral effects that other reductions under Proposition 47 might have had on the sentence. Here, one of the prior prison term enhancements had been negated by reduction of the felony conviction underlying it. Accordingly, as the parties agree, the trial court erred in reimposing the enhancement, and we will strike it.

Although defendant asserts remand for resentencing is futile because his sentence has been served, we will remand for the trial court to confirm defendant's status.

DISPOSITION

The one-year prior prison term enhancement based on the 2005 conviction under Health and Safety Code section 11377, subdivision (a) is stricken. The matter is remanded to the trial court for resentencing if appropriate. The trial court is directed to forward a certified copy of the amended abstract to the appropriate entities. In all other respects, the judgment is affirmed.